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TO: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
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SUBMISSION BY MEDIA MONITORING AFRICA:

**DISCUSSION DOCUMENT ON THE REVIEW OF THE INDEPENDENT BROADCASTING
AUTHORITY (ADVERTISING, INFOMERCIALS AND PROGRAMME SPONSORSHIP)
REGULATIONS, 1999**

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INTRODUCTION

1. Media Monitoring Africa (MMA) welcomes the opportunity to provide this submission to the Independent Communications Authority of South Africa (ICASA) regarding the Discussion Document on the Review of the Review of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsoring) Regulations, 1999 (the Discussion Document). MMA notes at the outset that this is a much-needed development, given that the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsoring) Regulations, 1999 (the Regulations) are significantly outdated and have been overtaken by an array of developments in the advertising and digital spaces. MMA therefore urges ICASA to treat this matter as one of priority, while still following due process with regard to processes of consultation and public participation.
2. Having had regard to the Regulations and the Discussion Document, particularly the questions posed in section 7 of the Discussion Document, this submission deals with three key thematic areas in line with MMA's vision and mission: the importance of media sustainability and editorial independence; the protection of children; and ICASA's role in online advertising. Accordingly, this submission is structured as follows:
 - 2.1. **First**, an overview of MMA.
 - 2.2. **Second**, certain overarching considerations.
 - 2.3. **Third**, our submissions with regard to media sustainability and editorial independence.
 - 2.4. **Fourth**, our submissions with regard to the protection of children.
 - 2.5. **Fifth**, our submissions with regard to ICASA's role in online advertising.
3. These are dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

4. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.

5. MMA has over 28 years' experience in media monitoring and direct engagement with media, civil society organisations, state institutions and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
6. MMA has engaged with ICASA on a number of previous occasions, including in respect of issues pertaining to editorial independence, spectrum, disability rights and the broadcasting of sports events. In all our work, we are guided by the Constitution of the Republic of South Africa, 1996, the public interest and the interests of justice. It is accordingly through this lens that the submissions below should be considered.
7. For more information about MMA, please visit: www.mediamonitoringafrica.org.

OVERARCHING CONSIDERATIONS

8. As a point of departure, MMA notes that this submission is informed by certain overarching considerations that must be borne in mind. We submit that these overarching considerations should also be expressly acknowledged in the final Discussion Document, as well as any draft regulations or policy documents that result from this.
9. In line with our commitment to the Constitution, the public interest and the interests of justice, we draw attention to the following:
 - 9.1. ***Importance of the right to freedom of expression:*** As an organ of state, ICASA is bound by the Bill of Rights,¹ and is therefore enjoined to respect, protect, promote and fulfil the rights contained therein.² It is necessary to recognise that the Regulations and the proposals contained in the Discussion Document have the potential to constitute a limitation of the right to freedom of expression.³ MMA urges ICASA to ensure that the importance of the right to freedom of expression is expressly articulated in the Discussion Document, and that any limitation of the right is only provided for to the extent that it is reasonable and justifiable in an open and democratic society.⁴ In doing so,

¹ Section 8(1) of the Constitution.

² Section 7(2) of the Constitution.

³ Section 16 of the Constitution.

⁴ Section 7(3), read with section 36, of the Constitution.

regard must be had to whether there are less restrictive means available to achieve the same purpose.⁵

- 9.2. **Legislative mandate:** Furthermore, as an organ of state, ICASA is strictly bound to the powers with which it is imbued in terms of its legislative mandate. In other words, ICASA can only exercise those powers and functions as provided for in legislation, which cannot be superseded by regulations. As such, to the extent that ICASA seeks to expand its mandate beyond that expressly provided for in the Electronic Communications Act 36 of 2005 (ECA), this will require an amendment to the ECA following an open and participatory public consultation process.
- 9.3. **Proposed merger:** MMA is cognisant of the proposed merger of ICASA, the Film and Publication Board (FPB) and the .za Domain Name Authority (ZADNA).⁶ MMA is also aware of the financial constraints that ICASA is currently experiencing, and the increased pressure that ICASA will be placed under should the merger proceed.⁷ In the light of these considerations, MMA would caution ICASA against aggressively seeking to expand its mandate unless it has the necessary resources to meet this mandate effectively.
- 9.4. **Overlapping roles:** Lastly in this regard, MMA notes the important role played by self-regulatory bodies, such as the Advertising Regulatory Board (ARB) and the Interactive Advertising Bureau of South Africa (IABSA), in the context of advertising. In determining the ambit of the Discussion Document and any amendments to the Regulations, caution should be exercised to ensure that the role of these self-regulatory mechanisms is not undermined or impeded.
10. With these overarching considerations in mind, MMA turns next to address certain of the key issues set out in the list of questions under section 7 of the Discussion Document.

⁵ Section 36(1)(e) of the Constitution.

⁶ MyBroadband, 'ZADNA, ICASA and FPB to be merged', 19 December 2019, accessible at <https://mybroadband.co.za/news/government/333156-zadna-icasa-and-fpb-to-be-merged.html>.

⁷ IT Web, 'ICASA eyes bigger budget to meet 'expanding' regulatory mandate', 18 May 2020, accessible at <https://www.itweb.co.za/content/kLgB1Me8XrK759N4>.

THEME I: MEDIA SUSTAINABILITY AND EDITORIAL INDEPENDENCE

(Questions 3, 4 5, 22 and 25 of the list of questions)

Current landscape

11. The Discussion Document raises important issues with regard to media sustainability and editorial independence. These include whether advertising should be permitted during news and current affairs programming; the impact of the Regulations on the financial viability of broadcasters; whether the Regulations are able to protect broadcasters in respect of editorial independence; the role of ICASA in striking a balance between the sustainability of broadcasters relating to revenue generation, on the one hand, and the protection of consumers, on the other; and the impact of online media on radio and television advertising revenue.
12. As a starting point, MMA emphasises that the importance of editorial independence and media sustainability cannot be gainsaid. As noted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO): “Journalists need editorial independence in order to be professional, ethical and serve the public. But today, journalism is under increased threat as a result of public and private sector influence that endangers editorial independence.”⁸ Under the topic of key threats to editorial independence, UNESCO identifies *inter alia* the undue influence of public relations (PR) shops, the power of big advertisers and pressures from big advertisers.⁹ As noted by Adam Leigh, the former deputy editor of The Independent:¹⁰

“[T]he reality for today’s media companies is that few, if any, journalists enjoy the luxury of saying whatever they like, about whoever they like, without regard for the consequences. Editing a newspaper or news programme always involves an element of risk mitigation: ‘If I publish this damaging content about company X, will the public interest outweigh or justify the blowback?’ In a harsh world, it can be a tough question to answer. Bluntly, any editor will always weigh the potential cost of his ‘independence’ before publishing content that disparages a significant advertiser, in the same way as they would before taking on a powerful public or political figure, so let’s not pretend otherwise.”

⁸ UNESCO, ‘Reporting facts: Free from fear or favour’, 2020 at p 1, accessible at https://en.unesco.org/sites/default/files/unesco_infocus_mediaindependence.pdf.

⁹ UNESCO, above n 8 at p 3.

¹⁰ PR Week, ‘Is editorial independence threatened when advertising spend is invoked?’, 11 February 2016, accessible at <https://www.prweek.com/article/1383097/editorial-independence-threatened-when-advertising-spend-invoked>.

13. The interplay between editorial independence when making advertising or sponsorship determinations is a complex and nuanced issue, particularly in the light of the current strain that media organisations are facing. According to South African National Editors' Forum (SANEF): "For many years, South Africa's news industry and in particular, its print media, has bucked international trends by managing to stay afloat by claiming a slice of an ever-reducing pie of advertising revenue. The COVID-19 pandemic has effectively taken that pie away and what is left is a news industry desperately looking for new ways of sustaining itself while audience demands for timely, credible but free news surges."¹¹
14. MMA makes two submissions under this theme: the first relates to the need for the Regulations to be strengthened to properly safeguard editorial independence; and the second relates to the role that ICASA can play in supporting media sustainability efforts. These are dealt with in turn below.

Editorial independence

15. MMA is concerned that the Regulations in their current form do not go far enough to properly safeguard editorial independence. Notably, only regulation 5(1) deals with editorial independence in respect of programme sponsorship, which provides that: "Every broadcaster who derives benefit for a programme sponsorship shall ensure that, in relation to the relevant sponsored programme, editorial control remains with that broadcaster." It is not clear, however, why editorial independence is only provided for in respect of sponsorships, or what is meant by the concept of editorial independence and the principles to which adherence is required.
16. With reference to the first point, MMA submits that the distinction between sponsorships, advertisements and infomercials in the context of editorial independence is arbitrary. Editorial independence should be safeguarded with reference to all three of these categories dealt with in the Regulations. This would require an amendment of regulations 3 and 4 to ensure that editorial independence is required and guaranteed in respect of advertisements and infomercials, respectively. In particular, despite the need that some media organisations may have for income-generation through advertising, their editorial independence should never be compromised. This is something that should be vigilantly and fiercely guarded.
17. With reference to the second point, MMA submits that the Regulations should clearly set out what is meant by editorial independence, including the relevant guiding principles. This is helpful for two reasons: it provides clarity to the relevant

¹¹ SANEF, 'SANEF's COVID-19 impact on journalism report (interim)', 1 June 2020, accessible at <https://sanef.org.za/sanef-launches-covid19-impact-on-journalism-interim-report-2/>.

organisations on the scope of ICASA's considerations on this issue; and it lays the basis for any complaint to be lodged to the extent that an organisation is falling foul of the requirement of editorial independence. Guidance in this regard may be drawn from clause 1 of Section 1 of the Code of Advertising Practice (the Code), published by the ARB, which provides that all advertisements should be legal, decent, honest and truthful; all advertisements should be prepared with a sense of responsibility to the consumer; all advertisements should conform to the principles of fair competition in business; and no advertisement should bring advertising into disrepute or reduce confidence in advertising as a service to industry and to the public.¹² Although the Code provides that these clauses are for introductory purposes and that no complaints can be lodged thereof,¹³ MMA submits that these are important principles that ought to be more clearly codified. In this regard, the Regulations should urge broadcasters and any other relevant licensees to have regard to these provisions when determining the selection and placement of advertisements, sponsorships or product placement.

Media sustainability

18. MMA's second submissions under this theme deals with the important role – and constitutional duty – that ICASA has to play in ensuring media sustainability. The correlation is clear: if media organisations are independently sustainable and not reliant on advertising revenue, the temptation to compromise editorial independence in the interests of an advertiser will be significantly diminished. As recommended in the Independent Panel Report in the Inquiry into Media Ethics and Credibility, prepared by Judge (retired) Kathleen Satchwell, Nikiwe Bikitsha and Rich Mkhondo (Independent Panel Report):¹⁴

18.1. ***Recommendation A2:*** “Encourage constitutional entities, government institutions and individual policymakers to publicly affirm their commitment to an independent media that robustly engages with all aspects of South African society to commit to activities that encourage trust in and support the credibility of such media; and to abjure all actions and comment that undermine it.”

18.2. ***Recommendation C26:*** “Collaborate with like-minded organisations on a large-scale public campaign, involving all stakeholders including lawmakers

¹² Clause 1.1 to 1.4 of Section I of the Code.

¹³ Clause 1 of Section I of the Code.

¹⁴ Satchwell and others, ‘Independent Panel Report: Inquiry into Media Ethics and Credibility’, January 2021 (updated in April 2021) at pp 13 to 17, accessible at <https://sanef.org.za/wp-content/uploads/2021/04/Satchwell-Report.pdf>.

and policymakers, all levels and spheres of government, industry, commerce and the education sector, to rebuild public trust in the media.”

- 18.3. **Recommendation D36:** “Lobby for public purse support for all continuing professional development discussed in the training recommendations, so that it is available to members of all newsrooms including those too small to be part of taxation-related training levy structures.”
- 18.4. **Recommendation D37:** “Ensure that any such public purse funding is free from conditionalities, underlining that news in a democracy is a public good.”
19. Following the publication of the recommendations in the Independent Panel Report, SANEF embarked on a process to develop a list of strategies to attain media sustainability and access to public interest journalism in South Africa. This process yielded the following results:¹⁵
- 19.1. **The establishment of a Media Sustainability Fund (MSF):** One of the priority media sustainability strategies for SANEF is the possible establishment of an MSF. The mission of the MSF – which may include what is referred to as a local content fund in the Independent Panel Report – is to support the development, sustainability and independence of public interest media organisations, in pursuance of the right to freedom of expression and democratic principles.
- 19.2. **Promoting access to public interest news websites:** Alongside an MSF, substantially reducing data costs and advocating for the zero-rating of public interest news websites and content have been identified as priority measures for SANEF.
- 19.3. **Fostering competition in the digital economy:** In line with international trends, the report notes international developments, particularly in Australia and the United States, relating to fostering competition in the digital economy, including through enhanced engagement with the so-called FAANGs (Facebook, Amazon, Apple, Netflix, and Google).
- 19.4. **Considering tax relief and other state support schemes:** Allied to fostering competition in the digital economy, tax relief and other state support schemes are documented in the report, including possibilities associated with converting license fees to a bespoke tax, the introduction of a new online advertising tax, and various other tax relief proposals for public interest media

¹⁵ SANEF, ‘Media sustainability and universal access to public interest journalism: Strategies and considerations’, 13 May 2021 at pp 7 to 8, accessible at <https://sanef.org.za/media-sustainability-and-universal-access-to-public-interest-journalism/>.

organisations and donors, including, for example, a proposed amendment to domestic tax laws to allow for tax deductions for businesses, donors, and individuals who subscribe to community and local media.

- 19.5. ***Engaging with different subsidisation, subscriptions, and other income-generating models:*** With an emphasis on comparative international examples, the benefits of subsidies are discussed in the report, alongside the potential of “access tiering” — the practice of offering memberships and subscription discounts to older persons, students, and social grant recipients — and new business models.
 - 19.6. ***Assessing the potential of coupon and open-access systems:*** By way of new sustainability strategies, the report introduces a possible coupon and open access system which facilitates subscriber access to premium content on multiple public interest news websites; and investigates the openTrust model, which promotes corporate social investment.
 - 19.7. ***Considering the establishment of public interest wire services:*** To assist with what is sometimes referred to as the “humdrum task or reporting on the daily activities of public institutions” and to promote community media, the report discusses the establishment of public interest wire services to (1) assist under-capacitated public interest media organisations and ensure that additional public interest media content is produced and distributed for publication, particularly on matters relating to the exercise of the democratic function and its institutions; and (2) collect local content from community media organisations and distribute it to larger media houses for a fee.
 - 19.8. ***Promoting education, training, and learnerships:*** Lastly, the report reflects on the importance of fellowships to train young journalists, continuing development opportunities for mid-career journalists, and the need for the South African government to fund media information literacy (MIL) initiatives.
20. MMA submits that ICASA has a critical role to play in these key initiatives, and that ICASA should consider endorsing this report and working with SANEF and civil society organisations to realise this vision. Through these initiatives, it is envisaged that media organisations can be less dependent on advertising revenues, and can thereby safeguard their editorial independence without fear or favour. This can go a long way in ensuring the balancing act between sustainability of broadcasters relating to income-generation through sponsorships, infomercials and advertising, on the one hand, and the need to protect consumers, on the other. As noted by SANEF, despite the years of decline in advertising revenues and the devastating impact of the COVID-19 pandemic, public interest media actors are proving to be

resilient, working tirelessly to develop new strategies for media sustainability.¹⁶ ICASA, as an organ of state and Chapter 9 institution, holds a constitutional obligation to respect, protect, promote and fulfil the right to freedom of expression, including the elements of editorial independence and media sustainability.

THEME II: PROTECTION OF CHILDREN
(Question 18 of the list of questions)

Best interests of the child

21. MMA is concerned that the Regulations are wholly insufficient in respect of the protection of children, and fail to respect, protect, promote and fulfil the best interests of the child. In this regard, the principle of the best interests of the child is firmly entrenched in section 28(2) of the Constitution, section 9 of the Children's Act 38 of 2005,¹⁷ article 3(1) of the Convention of the Rights of the Child¹⁸ (CRC) and article 4(1) of the African Charter on the Rights and Welfare of the Child¹⁹ (ACRWC). The Constitutional Court has described this principle as the "benchmark for the treatment and protection of children"²⁰ that requires a child-sensitive approach in all matter involving the child.²¹ Notably, it places an obligation on all decision-makers – which would include ICASA – to "ensure that the best interests of the child enjoy paramount importance in their decisions".²²
22. The United Nations Committee on the Rights of the Child has explained that the principle of the best interests of the child is three-fold:²³

22.1. ***Substantive right:*** It is a substantive right that creates intrinsic obligations on states.

¹⁶ SANEF, above n 15 at p 8.

¹⁷ This provides that: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

¹⁸ This provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

¹⁹ This provides that: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

²⁰ Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72.

²¹ S v M [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 15.

²² Above n 20 at para 73.

²³ Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the right of the children to have his or her best interests taken as a primary consideration (art. 3, para 1)', CRC/C/GC/14, 29 May 2013.

22.2. **Interpretative legal principle:** It is a fundamental, interpretative legal principle. Where there are multiple interpretations, a legal provision should be interpreted in a way that most effectively serves the best interests of the child.

22.3. **Rule of procedure:** It is a rule of procedure, whereby all decisions affecting a child must be rooted assessments, considerations, and determinations of their best interests.

23. With the above in mind, there are three key considerations to be emphasised:

23.1. **The innate vulnerability of children:** As noted by the Constitutional Court, children do not have the same capacity as adults to protect themselves, and are therefore more in need of protection.²⁴ The protection of children therefore forms a fundamental component of ensuring the paramountcy of their best interests.²⁵ The Constitutional Court has further noted that: “Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance ... Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties”.²⁶

23.2. **The need to create conditions to protect children:** There exists an obligation for the law to do all that it can to create conditions that protect children and expand their opportunities, so that they can lead productive and happy lives.²⁷ The principle of the best interests of the child captures the notion that children are developing.²⁸ The principle acknowledges that it is important for children to form opinions, participate in their communities, and learn as they grow about how to conduct themselves.²⁹

23.3. **Children’s rights are human rights:** Both the Constitution and international human rights law firmly entrench the position of children as rights-bearers. Importantly, beyond the child-specific rights, children are also entitled to the

²⁴ De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 63.

²⁵ Centre for Child Law v Media 24 Limited [2019] ZACC 46 at para 64.

²⁶ Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 1.

²⁷ S v M [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 15.

²⁸ J v National Director of Public Prosecutions [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 36. See, also, Le Roux v Dey [2011] ZACC 4 (CC); 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 212.

²⁹ Above n 27 at para 19.

full array of fundamental right that are guaranteed to all persons. It is a fundamental tenet of our constitutional dispensation that the principle of the best interests of the child “advances the child’s equal worth and freedom”.³⁰

24. In sum, an organ of state, such as ICASA, is required to apply the principle of the best interests of the child “by systematically considering how children’s rights and interests are or will be affected by their decisions and actions”.³¹

Measures to ensure the protection of children

25. MMA submits that, ideally, there should be no advertisements, product placements or sponsorships permitted during the broadcast of children’s programming. This submission is made with due regard to the evolving maturities of children and the need to protect children from undue and potentially harmful influences. According to an article published by the American Psychological Association, the advertising industry spends \$12 billion per year on advertisements targeted to children, bombarding young audiences with persuasive messages through their messaging; on average, a child is exposed to more than 40 000 advertisements in a single year.³² This is deeply concerning, and it is imperative that this be dealt with in the Regulations.

26. To the extent that ICASA is not in agreement that there should be no advertisements, product placements or sponsorships permitted during the broadcast of children’s programming, the Regulations should still be implemented on the types of advertising, product placements or sponsorships that children may be exposed to. In November 2020, MMA endorsed a submission by the Children’s Institute and others on this issue in response to the draft White Paper on Audio and Audiovisual Content Services Policy Framework. This submission highlighted various obligations set out in the international law instruments that have been signed and ratified by South Africa:

26.1. **Article 17(e) of the CRC:** Article 17(e) of the CRC encourages governments to develop “guidelines for the protection of the child from information and material injurious to his or her well-being”.

26.2. **Article 24 of the CRC:** Article 24 of the CRC states that protecting children from exposure to unhealthy food and alcoholic beverages is important to protect

³⁰ Above n 20 at para 72.

³¹ Committee on the Rights of the Child, ‘General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child’, CRC/GC/2003/5, 27 November 2003.

³² Dittman, ‘Protecting children from advertising’, June 2004, accessible at <https://www.apa.org/monitor/jun04/protecting>.

their right to survival and development and their right to the highest attainable standard of health.

26.3. **General Comment No. 16 of the Committee on the Rights of the Child:** This document, which addresses state obligations to protect children from harmful business practices, highlights the risks associated with the marketing of harmful products to children, and proposes preventative measures, such as regulation, to create an enabling environment conducive to children's rights.

26.4. **Article 12 of the International Covenant on Economic, Social and Cultural Rights:** This provides that all persons, including children, have the right to the highest attainable standard of health.

26.5. **General Comment No. 14 of the Committee on Economic, Social and Cultural Rights:** This stipulates that the failure to regulate the activities of corporations to prevent them from violating individuals' health may amount to a violation of the right to health in itself.

27. There is therefore a clear duty on ICASA to ensure the protection of children, which can and should be done through the Regulations. To the extent that advertisements, product placements or sponsorships are permitted during the broadcast of children's programming, MMA submits that every measure should be taken to ensure that this is not dangerous or harmful to the health, development and best interests of a child who may view such content. In order to define the parameters of such content, MMA proposes that ICASA establish a taskteam, comprising experts, academics and civil society organisations working on issues pertaining to children's rights, to inform the final determination.

THEME III: ROLE IN ONLINE ADVERTISING

(Question 27 of the list of questions)

28. It is apparent from the questions contained in the Discussion Document that ICASA seeks to understand what role, if any, it should play in regulating advertising, infomercials and programme sponsorship in the digital era. As a point of departure, regard must be had to section 55 of the ECA, as amended, which provides as follows:

“(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa, in accordance with section 17C of the ICASA Act, as well as complaints concerning alleged breaches of the advertising regulations.

(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority of South Africa, is found to have breached the Code or advertising regulations, such broadcasting licensee must be dealt with in accordance with applicable provisions of sections 17A to 17H of the ICASA Act.”

29. In prescribing that all broadcasting service licensees must adhere to the Code in respect of the scheduling of advertisements, ICASA has a partial mandate in respect of online content. However, in MMA’s view, this is very limited, and there is an urgent need to address online advertising in South Africa. Although the ARB does play a role, this is a voluntary mechanism, and there are many key stakeholders who fall outside of the jurisdiction of the ARB. Moreover, the recent judgment of Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC and Others³³ has wholly curtailed the guidance that the ARB is permitted to provide in respect of non-members. In this regard, the order read as follows:

“1. Clause 3.3 of the MOI, which has the effect of granting the ARB jurisdiction over non-members, is declared unconstitutional, void and unenforceable.

2. The clause "in the absence of a submission to its jurisdiction" in the first sentence as well as the second sentence in its entirety are severed from clause 3.3 of the MOI.

3. It is declared that the ARB has no jurisdiction over a non-member of the ARB, meaning a person or entity who is not a member of the ARB or is not a person or entity who is bound by the Code as a result of its/her/his membership of a member of the ARB.

4. The ARB may not issue rulings against or in relation to a non-member or that non-member's advertising.

5. The FAC rulings in this matter are unlawful and are set aside.

³³ [2021] ZAGPJHC 57.

6. The ARB is directed to pay to Bliss the sums of money lodged by it with the ARB to cover the costs of its appeals to the AAC and the FAC in terms of clauses 9.2 and 12.6, respectively, of the Procedural Guide.

7. The costs of the applicant are to be paid by the respondents jointly and severally, the one paying the others to be absolved, save that the ARB's liability for costs is confined to the constitutional challenge only and shall include the costs of two counsel only, whereas the liability of the second and third respondents shall include the costs of three counsel."

30. The regulation of online advertising is a complex and nuanced issue, and one that requires appropriate consultation and deliberation. It is not clear from the Discussion Document the extent to which ICASA seeks to engage in this realm. What is also clear is that these will be the future battlegrounds where the most disputes, innovations and breaches are likely to occur. It is critical that the issues are urgently addressed. While MMA submits that ICASA has a critical role to play, this would likely require an amendment to the ECA to provide for this, which must necessarily be preceded by an appropriate public participation and consultation process.

CONCLUSION

31. MMA reiterates its appreciation for the opportunity to provide this submission, and would welcome the opportunity to make oral submissions at the public hearings as well. While the Discussion Document is a welcome development, it is clear that there is much work that still needs to be done to understand ICASA's own position on the abovementioned themes. Notwithstanding the importance of a deliberative approach, MMA stresses that these are important issues that must be dealt with as a matter of urgency, and urges ICASA to prioritise the amendments to the Discussion Document and the Regulations.
32. MMA remains willing and available to provide any further information that may be of assistance to ICASA.

**MEDIA MONITORING AFRICA
7 JUNE 2021**